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Supreme Court, U.S.
FILED

No. 97 1274 FEB 04 1998

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STAFF SERGEANT RALPH VARGAS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR WRIT OF CERTIORARI

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December 1997

47 pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the Armed Forces erred when it found that petitioner's convictions for rape and adultery, arising out of the same act of sexual intercourse, were not multiplicious for findings.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

REASON FOR GRANTING THE WRIT 2

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES ERRED WHEN IT FOUND THAT PETITIONER'S CONVICTIONS FOR RAPE AND ADULTERY, ARISING OUT OF THE SAME ACT OF SEXUAL INTERCOURSE, WERE NOT MULTIPLICIOUS FOR FINDINGS.

CONCLUSION. 8

APPENDIX A

(Opinion of the United States Court of Appeals for the Armed Forces, dated 5 November 1997). 1a

APPENDIX B

(Opinion of the United States Air Force Court of Criminal Appeals, dated 14 April 1997). 2a

APPENDIX C

(*United States v. Charroin* (unpublished) ACM S29286 (A.F.Ct.Crim.App., April 29, 1997) . . . 8a

APPENDIX D

(*United States v. Britton*, No. 96–1002, — M.J. — (September 19, 1997) 12a

TABLE OF AUTHORITIES

Page

Federal Cases:

Ball v. United States, 470 U.S. 8567, 105 S.Ct. 1668, 84 L.Ed. 2d 740 (1985) 7

Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1993) 7

Military Cases:

United States v. Barrick, 41 M.J. 696 (A.F.Ct.Crim.App. 1995) 8

United States v. Britton, No. 96–1002, — M.J. — (September 29, 1997) 8

United States v. Charroin, unpublished, ACM S29286 (A.F.Ct.Crim.App., April 29, 1997) 8

United States v. Foster, 40 M.J. 140 (C.M.A. 1994) 7

United States v. Hickson, 24 M.J. 146 (C.M.A. 1968) 7, 8

United States v. Morrison, 41 M.J. 482 (1995) 6, 7

United States v. Oatney, 41 M.J. 619 (N.M.Ct.Crim.App. 1994) 7

United States v. Teters, 37 M.J. 370 (C.M.A. 1993) 6, 7

United States v. Weymouth, 40 M.J. 798 (A.F.C.M.R. 1994) 7

Federal Statutes:

10 U.S.C.A. § 867(a) (West Supp. 1996) 1

28 U.S.C.A. § 1259(3) (West Supp. 1996) 1

Article 134, Uniform Code of Military Justice
(10 U.S.C. § 934) 2

Articles 120, Uniform Code of Military Justice
(10 U.S.C. § 920) 2

United States Constitution:

Fifth Amendment 1

The petitioner, Staff Sergeant Ralph Vargas, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on November 5, 1997.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces is not yet reported in an advance sheet or the Military Justice Reporter. That decision, No. 97-0915, __ M.J. __ (November 5, 1997), is located at Appendix A. The opinion of the United States Air Force Court of Criminal Appeals, ACM 32090 (unpublished) (A.F.Ct.Crim.App., April 14, 1997), is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on November 5, 1997. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259 (3) (West Supp. 1996) and 10 U.S.C.A. § 867(a) (West Supp. 1996).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the Constitution of the United States provides in relevant part that "[n]o person shall . . . be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

Procedural History:

On 14 and 18 November 1995, petitioner was tried by a general court-martial at Aviano Air Base, Italy. The petitioner

was convicted, in accordance with his pleas, of one specification of rape, in violation of Articles 120, Uniform Code of Military Justice (10 U.S.C. § 920), and one specification each of indecent assault and adultery, in violation of Article 134, Uniform Code of Military Justice (10 U.S.C. § 934). Although the petitioner pled guilty to obstruction of justice, in violation of Article 134, Uniform Code of Military Justice (10 U.S.C. § 934), that specification was dismissed. The petitioner was sentenced to a dishonorable discharge, confinement for four years, and reduction to the grade of airman basic (E–1).

On appeal, both the Air Force Court of Criminal Appeals and the United States Court of Appeals for the Armed Forces held that appellant's convictions for rape and adultery, although arising out of the same act of sexual intercourse, were not multiplicious for findings in the military as a matter of law.

REASON FOR GRANTING THE WRIT

THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES ERRED WHEN IT FOUND THAT PETITIONER'S CONVICTIONS FOR RAPE AND ADULTERY, ARISING OUT OF THE SAME ACT OF SEXUAL INTERCOURSE, WERE NOT MULTIPLICIOUS FOR FINDINGS.

Facts

The appellant's convictions for rape and adultery (*see* Statement of the Case above) were based on the same exact act of sexual intercourse. The facts of record in this case are found in the Stipulation of Fact (R. Prosecution Exhibit 1), and in the inquiry into the providence of the guilty plea (R. 45–57).

The petitioner is a thirty-seven year old Staff Sergeant with over seventeen years active military service. On 27 April 1993, the petitioner was assigned to the 100th Operations Support Squadron (USAFE), RAF, Mildenhall, England. On 13 July 1994, the petitioner traveled to Aviano Air Base, Italy, on temporary duty (hereinafter "TDY") to assist the Operations Support Squadron (OSS) in support of Operation Deny Flight. Shortly thereafter, another airman, Senior Airman Lisa Stuart, also arrived at Aviano Air Base where her duties were with the 31st OSS Weather Flight. Although the petitioner and Senior Airman Stuart lived in different off base hotels, they became friends and saw each other frequently. They worked together and shared rides to and from work and social functions and spent off duty time together. Senior Airman Stuart would invite the petitioner to go walking with her, to go camping and to participate in other activities.

On 21 October 1994, several members of the OSS were to meet at the enlisted lounge of Sabre Hall, a club located on Aviano Air Base. Senior Airman Stuart had arranged with the petitioner earlier that day to pick him up and give him a ride to Sabre Hall. After arriving at Sabre Hall, they met several friends and began to drink and socialize. Around 1930 hours, the petitioner and another airman left to get something to eat. Around 2100 hours, several of the individuals left Sabre Hall and proceeded to the Alpino Hotel where they played cards. The petitioner and Senior Airman Stuart were present at that hotel; however, the petitioner did not participate in the card game. Sometime during the card game, the petitioner informed Senior airman Stuart that he wanted to go to Falcon Hall on base to attend country night.

After finishing the card game, Senior Airman Stuart agreed to take petitioner to Falcon Hall. Despite having consumed a considerable amount of alcohol, Senior Airman

Stuart insisted on driving and did drive to Falcon Hall. At Falcon Hall, the petitioner accompanied Senior Airman Stuart into the club. Upon entering the club, Senior Airman Stuart asked petitioner to hold on to her as she was drunk and needed to use the restroom. She asked petitioner to wait for her while she went to the bathroom. He did as she asked; thereafter, they proceeded to the bar area where petitioner had a rum and coke and Senior Airman Stuart had a plain coke. They danced to a few songs and then Senior Airman Stuart saw a friend whom she knew from work. She walked over to this friend, and she and the friend began to talk and eventually were kissing each other. At around 0030 hours a fight erupted, and Senior Airman Stuart came to petitioner and asked for her keys to the car. She had given him the keys earlier in the evening. The petitioner gave her the keys. The petitioner asked Senior Airman Stuart if she would wait for a few minutes while he was talking to his friend. The next thing petitioner knew, she was gone. A short time later, Senior Airman Stuart pulled her car in front of the fitness center, motioned to and yelled for petitioner.

From there they proceeded to the California Bar. Senior Airman Stuart was driving. Senior Airman Stuart bought some food and then stated she wanted to go home. On the way home petitioner asked her if she would like to watch a movie on AFN TV. Senior Airman Stuart was driving. Instead of taking petitioner to his hotel, she drove to her hotel. Once there she invited petitioner to her room. They arrived at her room at approximately 0100 hours. The petitioner sat on the floor in front of the TV while Senior Airman Stuart went into the bathroom. She returned and stood in front of petitioner and began to undress. She took off her skirt and panty hose and laid down on the bed next to where petitioner was sitting. After being in the bed for a while, she began to move around. She laid on her side with her buttocks up close

to petitioner. He reached over and started caressing her buttocks and then her vagina. While caressing her vagina, he inserted his fingers and then pulled her panties off. The petitioner then removed his clothing and had sexual intercourse with Senior Airman Stuart.

According to Senior Airman Stuart, the next morning when she awoke, she thought she had had a bad dream that someone was on top of her. She went to the bathroom and after some unspecified investigation, determined that she had engaged in sexual intercourse the prior evening. Senior Airman Stuart stated, "I had no knowledge or feelings that anything was going on until I woke up the next morning." (R. Allied Papers, Article 32 Investigation, statement of Lisa Stuart). According to her statement, she then thought she had been raped by petitioner. She did not contact the police and did not report her suspicions.

The next day, at approximately 1730 hours, she mentioned to a friend, Staff Sergeant Andy Stahlbush, that she was going to call petitioner and tell him what she thought of him. She stated, "that piece of shit thinks he needs to grope on women that are passed out." *Id.* She said nothing more to Staff Sergeant Stahlbush. At around 1815 hours that evening she called petitioner. During this conversation she initiated the possibility of receiving payment and settled on a required amount of $5,000.00 not to turn him in. Thereafter, petitioner agreed and sent her a check in the amount of $300.00 along with a note of apology. Senior Airman Stuart then called her good friend, Diane Stahlbush, the wife of Staff Sergeant Stahlbush, and told her of the extortion. The next day at work she told Staff Sergeant Stahlbush that "it had been rape and that Ralph and I had decided on $5,000.00." *Id.* Staff Sergeant Stahlbush told her that what she was doing was extortion. (R. Allied Papers, Article 32 Investigation, OSI Report of Investigation, statement of Staff Sergeant Stahlbush).

On 24 October 1994, Staff Sergeant Stahlbush notified the OSI of the attempted extortion and the alleged rape. (R. Article 32 Investigation, OSI Report of Investigation). Staff Sergeant Stahlbush informed the OSI that Senior Airman Stuart told him she had been raped during the early morning hours of 22 October 1994 in her hotel room and instead of reporting the rape, attempted to extort $5,000.00 from petitioner for the promise of keeping quiet about the alleged incident. The alleged victim had not reported the rape and had no intention of reporting the rape. Thereafter, the OSI used petitioner in an attempt to gather evidence against the alleged victim. Petitioner met several times with the alleged victim, she invited him to a party she was having, she asked him to pick up dinner for her while she was working and continued to have a social relationship with him.

Further facts necessary to the disposition of the issue are included in the section below.

Law and Analysis

In *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993), *cert. denied*, 114 S.Ct. 919 (1994), the Court of Appeals for the Armed Forces, then the Court of Military Appeals, adopted the congressional intent/elements test for determining the multiplicity of charges. *Teters*, however, did not specifically deal with multiplicity for sentencing. In *United States v. Morrison*, 41 M.J. 482 (1995), the Court of Appeals for the Armed Forces specifically held that charges which are not multiplicious for findings are not multiplicious for sentencing: "When the *Blockburger* rule, i.e., the "elements" test, is satisfied, "separate offenses warranting separate convictions *and punishments* can be presumed to be Congress' intent." (citations omitted, emphasis in original).

Teters did not affect the basic tenet of military law that "what is substantially one transaction should not be made the

basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4)(Discussion); *See also United States v. Foster*, 40 M.J. 140, 144 n. 4 (C.M.A. 1994)(". . . *Teters* notwithstanding, military judges must still exercise sound judgment to ensure that imaginative prosecutors do not needlessly 'pile on' charges against a military accused."); and *United States v. Oatney*, 41 M.J. 619, 630 (N.M.Ct.Crim.App. 1994), *aff'd* 45 M.J. 185 (1996). In *Morrison, supra*, the Court of Appeals for the Armed Forces reaffirmed this principle, stating that "Our holding should not be read as carte blanche for unreasonable multiplication of charges by creative drafting." 41 M.J. 482, at 484, n.2.

In *United States v. Hickson*, 22 M.J. 146, 155 (C.M.A. 1968), the then Court of Military Appeals ruled that, as a matter of law, convictions for rape and adultery, arising from the same act of sexual intercourse, would not be allowed in the military. In reaching that conclusion, the then Court of Military appeals applied this Honorable Court's analysis in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) and *Ball v. United States*, 470 U.S. 8567, 105 S.Ct. 1668, 84 L.Ed. 2d 740 (1985) and looked to congressional intent. The Court of Appeals for the Armed Forces determined that congressional intent did not allow convictions in the military for adultery and rape arising from the same act of sexual intercourse. *See United States v. Weymouth*, 40 M.J. 798, 801 (A.F.C.M.R. 1994), *aff'd* 43 M.J. 329 (1995)(discussing *Hickson* and application by the Court of Blockburger in that decision). That decision has not been overruled by the Court of Appeals for the Armed Forces and still is the law. In holding against appellant, the Court of Appeals for the Armed Forces did not overrule Hickson. The Air Force Court of Criminal Appeals previously acknowledged that "the Court of Military Appeals has held that a person may not be convicted of both rape and adultery

based on the same act." *United States v. Barrick*, 41 M.J. 696, 700 (A.F.Ct.Crim.App. 1995). In *United States v. Charroin*, however, the Air Force Court of Criminal Appeals stated, "The Court of Appeals for the Armed Forces' refusal to review [*United States v. Mason*, 42 M.J. 584 (Army Ct.Crim.App.), *pet. denied*, 43 M.J. 166 (1995)] strengthens our confidence that *Hickson* has been discredited at least, if not specifically overruled." *United States v. Charroin* (unpublished) ACM S29286 (A.F.Ct.Crim.App., April 29, 1997)(Appendix C, p. 2).

The Court of Appeals for the Armed Forces relied on its decision in *United States v. Britton*, No. 96-1002, __ M.J. __ (September 29, 1997)(Appendix D) to affirm the petitioner's convictions for both rape and adultery. That Court erred, however, because it affirmed the petitioner's convictions without overruling its decision in *Hickson*. Accordingly, corrective action is required from this Honorable Court and the adultery specification must be dismissed.

CONCLUSION

Petitioner's convictions for rape and adultery based on the same act of sexual intercourse violate the petitioner's Fifth Amendment right not to be tried twice for the same offense. As such, his convictions for both cannot stand.

Respectfully submitted,

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December 1997

APPENDIX A

UNITED STATES, Appellee

v.

Ralph VARGAS, (449–15–0664), Appellant

USCA Dkt. No. 97–0915/AF
Crim. App. No. 32090

ORDER

On consideration of the granted issue, MJ __ (Daily Journal, September 10, 1997), and in light of *United States v. Lloyd*, 46 MJ 19 (1997), and *United States v. Hill*, __ MJ __ __ (Daily Journal, September 30, 1997), we hold that the charges of rape (Art. 120, Uniform Code of Military Justice, 10 USC § 920), and adultery (Art. 134, UCMJ, 10 USC § 934), were not multiplicious. *See United States v. Britton*, No. 96–1002, __ MJ __ (September 29, 1997). Accordingly, it is, by the Court, this 5th day of November, 1997,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Newton)
Appellate Government Counsel (Neurock)

APPENDIX B

UNITED STATES

v.

Staff Sergeant RALPH VARGAS, FR449–15–0664
United States Air Force

ACM 32090

14 April 1997

Sentence adjudged 18 November 1995 by GCM convened at Aviano Air Base, Italy. Military Judge: James A. Young III (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 2 years, and reduction to E–1.

Appellate Counsel for Appellant: Mr. David R. Dowell (argued). Colonel Jay L. Cohen, Colonel David W. Madsen, Lieutenant Colonel Kim L. Sheffield, and Captain Michael L. McIntyre.

Appellate Counsel for the United States: Captain Mitchel Neurock (argued), Colonel Theodore J. Fink, and Lieutenant Colonel Michael J. Breslin.

Before

HEIMBURG, GAMBOA, and SENANDER
Appellate Military Judges

OPINION OF THE COURT

SENANDER, Judge:

The appellant was convicted, in accordance with his pleas, of rape, indecent assault, and adultery. Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934 (1994). His approved sentence is a dishonorable discharge, 2 years confinement, and reduction to E–1. The appellant asserts denial of speedy trial, ineffective assistance of counsel, multiplicity, improvidence of his pleas, and an inaccurate and insufficient staff judge advocate recommendation. We find no error and affirm.

The appellant was in a temporary duty status at Aviano Air Base, Italy. The appellant and the victim worked together and were living in off-base hotels and as a result became friends. Senior Airman (SrA) LS, the victim, picked up the appellant at his hotel on the evening of October 21, 1994. They went to both on and off base clubs during the course of the evening. SrA LS was drinking heavily during the evening and consumed between 18 and 20 mixed drinks. At 0100 SrA LS told the appellant she was tired and wanted to go home. While driving to SrA LS's hotel room the appellant invited himself in to watch a movie on television. They watched the movie for awhile and then SrA LS went to bed and fell asleep while the appellant continued to watch the movie.

Later SrA LS rolled over while sleeping, exposing her buttocks. The appellant massaged her buttocks and when there was no reaction he moved his hand to her vagina. When there was still no reaction the appellant removed her panties, undressed himself, and had intercourse with her until he ejaculated. The appellant then apologized to SrA LS while she slept. He put her panties back on and left.

The next morning SrA LS felt sore, similar to the way she felt when she had previously engaged in intercourse. She

checked the bed and found stains on the sheets. She thought the appellant may have raped her and called him the next day. She told him she knew what he did and he responded by saying he was sorry. She refused his apology and told him he was a felon and she could have him "sent to Leavenworth." The appellant continued to apologize and asked her not to tell anyone, and asked what he could do to make it up to her. SrA LS asked how much his career, family, and avoiding jail meant to him. He offered $500.00. She was incensed and asked for $5000.00. A few hours later the appellant placed an apology letter under her door with a $300.00 installment on the $5000.00 demand. SrA LS told a friend about the rape and showed him the $300.00 check. That friend considered her action to be extortion and reported the details to the Air Force Office of Special Investigations (AFOSI). The appellant confessed his involvement with SrA LS and cooperated with the AFOSI in a sting operation against her.

The appellant's first assignment of error involves a 44-day delay granted by the military judge based on information provided by the trial counsel that the victim was undergoing a biopsy procedure for possible breast cancer. There is no dispute that the government is responsible for the 91 days of delay up to October 3, 1995. The trial counsel contacted the defense counsel prior to October 3, 1995 and informed him that SrA LS was not available because she had to undergo a biopsy. Counsel agreed to a November 16, 1995 trial date. The military judge was so informed and granted the prosecution's request to delay the trial based on the unavailability of the alleged victim. The appellant now contends that he did not agree to the November 16, 1995 trial date, but merely acquiesced to the government's suggested date.

Periods of time covered by pretrial delays approved by a military judge or the convening authority are excluded when

determining whether the government has complied with the 120-day period to bring an accused to trial. R.C.M. 707(c). The decision whether to grant a delay and the duration of that delay is within the sole discretion of the military judge. We review the military judge's decision for an abuse of discretion. *United States v. Nichols,* 42 M.J. 715 (A.F. Ct.Crim.App. 1995), *pet. denied,* 43 M.J. 429 (1995). We find no abuse of discretion in the military judge's decision to grant the delay until November 16, 1995. With the uncertainty of the medical condition of the victim, it was totally reasonable to set a date that was not subject to further changes because of the victim's potential medical treatment. Likewise, we find no violation of the accused's speedy trial rights under the Sixth Amendment of the U.S. Constitution. The appellant agreed to the delay until November 16, 1995 and then demanded a speedy trial 31 days before the scheduled trial date. He has shown no prejudice suffered by the delay

The appellant asserts that his trial defense counsel was ineffective by failing to investigate information concerning a previous rape of SrA LS at Keesler Air Force Base, Mississippi. He claims SrA LS also attempted to extort money from the alleged rapist in that case. The appellant by affidavit provided the name and employer of the individual who allegedly had this information.

The standard for measuring a claim of ineffective assistance of counsel is set forth by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 687 (1984). *See also United States v. Scott,* 24 M.J. 186 (C.M.A. 1987). Appellant must show counsel's performance was deficient and also show prejudice. The appellant pled guilty to the offenses charged and did not claim that the victim was aware or consented to sexual intercourse. He has failed to show what relevance this hearsay information has to his case. We find no evidence that trial defense counsel's performance was deficient. Trial

defense counsel's strategy was reasonable based on the appellant's confession and therefore does not support appellant's claim of ineffectiveness of counsel. The plea agreement obtained by the trial defense counsel was a sound strategy based on the facts presented. *United States v. Mansfield*, 24 M.J. 611, 617 (A.F.C.M.R. 1987). Tactical decisions will not be second-guessed. *United States v. Sanders*, 37 M.J. 116, 118 (C.M.A. 1993). We reject this assignment of error.

The appellant was found guilty of both rape and adultery arising out of the same act. He now asserts his convictions are multiplicious as a matter of law. The offenses of rape and adultery are separate and distinct punishable offenses which address two different societal concerns. *United States v. Mason*, 42 M.J. 584 (Army Ct.Crim.App. 1995), *pet. denied*, 43 M.J. 166 (1995). Here the appellant entered into a plea agreement by which he pled guilty to both adultery and rape and benefited by that agreement. We hold that he waived appellate consideration of multiplicity claims by his guilty plea. *United States v. Lloyd*, 46 M.J. 19 (1997).

The appellant next asserts the Staff Judge Advocate Recommendation (SJAR) to the convening authority was prejudicially inaccurate and insufficient. He contends the SJAR expressed disagreement with the decision in *United States v. Hickson*, 22 M.J. 146 (C.M.A. 1986) and recommended the convening authority approve the rape and adultery convictions and let the appellate courts decided if there was an inherent unfairness in approving convictions for both offenses.

The Staff Judge Advocate properly advised the convening authority of a potential issue and advised him to take an action based on what he believed the law to be. We do not find the SJAR to be erroneous, inadequate, or misleading. The *Hickson* case can be distinguished on the facts since the

appellant's case involved a guilty plea to both offenses and he waived the issue of multiplicity.

The appellant asserts that his guilty pleas to rape and indecent assault were improvident because the military judge did not obtain a factual basis for the pleas. R.C.M. 910(e). The appellant's assertion is without merit. The appellant signed a stipulation of fact, which he adopted on the record, and recounted the events in his own words. The military judge asked some leading questions to clarify the facts. Counsel for both sides agreed the inquiry was sufficient. The totality of the record indicates a sufficient factual basis for the pleas, and there is no evidence in the record of trial which is in substantial conflict with the pleas.

We conclude the findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to the substantial rights of the appellant was committed. Accordingly, the findings of guilty and the sentence are

AFFIRMED.

Senior Judge HEIMBURG and Judge GAMBOA concur.

OFFICIAL

LAURA L. GREEN
Clerk of Court
Court of Criminal Appeals

APPENDIX C

UNITED STATES

v.

Airman First Class DAVID S. CHARROIN, FR508–84–9370
United States Air Force

ACM S29286

29 April 1997

Sentence adjudged 27 August 1996 by SPCM convened at Fairchild Air Force Base, Washington. Military Judge: Donald E. Walsh.

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E–l.

Appellate Counsel for Appellant: Colonel David W. Madsen, Lieutenant Colonel Kim L. Sheffield, and Captain W. Craig Mullen.

Appellate Counsel for the United States: Colonel Theodore J. Fink and Lieutenant Colonel Michael J. Breslin, and Major LeEllen Coacher.

Before

PEARSON, MORGAN, C.H., II, and MORGAN, J.H.
Appellate Military Judges

OPINION OF THE COURT

MORGAN, C. H., II, Judge:

A special court-martial consisting of members sentenced appellant to a bad-conduct discharge, confinement for six months, and reduction to airman basic following his pleas of

guilty to carnal knowledge and adultery in violation of Articles 120 and 134, respectively, of the Uniform Code of Military Justice, 10 U.S.C. §§ 920, 934. Both offenses sprang from appellant's one-time act of sexual intercourse with the 14-year-old stepdaughter of an active-duty staff sergeant. In a well-briefed single assignment of error, appellant protests that adultery and carnal knowledge charged on the basis of the same act of sexual intercourse are multiplicious or that, in the alternative, charging in that manner offends the equitable admonition against the unreasonable multiplication of charges. We hold that appellant waived that issue through his failure to raise it at trial.

Questions of multiplicity are waived through a provident guilty plea by more object at trial unless the two offenses are facially duplicative. *United States v. Lloyd,* 46 M.J. 19 (1997). Because of the uncertain nature of the law in cases such as this, we take time to explain why, in our view, these offenses are not facially duplicative.

In a two-judge opinion in *United States v. Hickson,* 22 M.J. 146 (C.M.A. 1986), with one judge concurring in the result, then Chief Judge Everett held that adultery and rape are multiplicious where both relate to the same act of sexual intercourse. His conclusion rested in part on the so-called "single transaction" or "fairly embraced" approach to multiplicity epitomized in *United States v. Baker,* 14 M.J. 361 (C.M.A. 1983) Judge (now Chief Judge) Cox concurred in the result in *Hickson,* but not because he perceived that such charging ran afoul of the constitutional precepts of *Blockburger v. United States,* 284 U.S. 299 (1932). On the contrary, Judge Cox believed the charging to be permissible under *Blockburger's* statutory construction/elements test. His concurrence was based instead on his view that the offenses were "mutually exclusive" in conjunction with the policy preference in the then-current Manual for Courts-Martial

against joinder of major and minor offenses. MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 26c (1969 Revised edition). Thus lacking a consistent rationale to understand what *Hickson* actually stands for, appellant asks, not unreasonably, that we extend its logic to cover his case. There would be merit to this argument if *Hickson* were still good law.

Hickson's partial reliance on *Baker* calls into question its continued precedential value in the wake of the specific repudiation of the *Baker* approach in *United States v. Teters*, 37 M.J. 370, 375–76 (C.M.A. 1993). Our sister Court, referring to *Hickson's* "dubious language on Congressional intent," has decided that *Teters* overruled it *sub silentio*, and thence that rape and adultery are no longer multiplicious, *United States v. Mason*, 42 M.J. 584, 585 (Army Ct.Crim.App.), *pet. denied*, 43 M.J. 166 (1995). The Court of Appeals for the Armed Forces' refusal to review the *Mason* holding strengthens our confidence that *Hickson* has been discredited at least, if not specifically overruled. What precedential value remains in *Hickson*, if any, seems to us to be insufficient to relieve appellant from the necessity to raise the multiplicity issue at trial.

The second component to what we will broadly define as the "over-charging" question is whether, even though the two offenses are not multiplicious in the constitutional sense, they might nevertheless constitute an "unreasonable multiplication of charges, "entitling appellant to apply to the military judge for equitable sentencing relief, or an instruction to the members. *See United States v. Erby*. ___ M.J. ___ ACM 32391 (A.F. Ct.Crim.App. Apr. 25, 1997). Without intimating in any way whether such relief would have any meaning in the context of a special court-martial, or even whether a ruling denying relief is reviewable for legal error, we hold that

question for another day. A military judge cannot exercise discretion if he is not asked. *Id.*

Finding no error prejudicial to appellants substantial rights, the findings are correct in law and fact, the sentence is not inappropriately severe, and the same are hereby

AFFIRMED.

Senior Judge PEARSON and Judge J.H. MORGAN concur.

OFFICIAL

LAURA L. GREEN
Clerk of Court

APPENDIX D

United States, Appellee

v.

Glen A. BRITTON, Airman First Class
U.S. Air Force, Appellant

No. 96–1002

Crim. App. No. 31948

United States Court of Appeals for the Armed Forces

Argued May 13, 1997

Decided September 29, 1997

Counsel

For Appellant: *Major Gerald R. Bruce* (argued); *Lieutenant Colonel Kim L. Sheffield, Captain W. Craig Mullen,* and *Captain Jeffrey B. Miller,* USAFR (on brief); *Colonel Jay L. Cohen.*

For Appellee: *Major LeEllen Coacher* (argued); *Colonel Theodore J. Fink* and *Lieutenant Colonel Michael J. Breslin* (on brief); *Captain R. Scott Howard.*

Military Judge: Dennis E. Kansala

Tried at Kelly Air Force Base, Texas

Opinion of the Court

GIERKE, Judge:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of rape and assault with intent

to commit rape, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 USC §§ 920 and 934, respectively. The adjudged and approved sentence provides for a dishonorable discharge, confinement for 6 years, total forfeitures, and reduction to the lowest enlisted grade. The Court of Criminal Appeals affirmed the findings and sentence in an unpublished opinion.

Our Court specified the following issue:

> WHETHER THE CHARGE AND ADDITIONAL CHARGE ARE GREATER AND LESSER INCLUDED OFFENSES AND THEREFORE MULTIPLICIOUS FOR FINDINGS; AND, IF SO, WHETHER APPELLANT HAS WAIVED THE ISSUE.

Factual Background

Appellant was charged with rape and assault with intent to commit rape. The rape specification alleges that appellant "did, at or near San Antonio, Texas, between on or about the evening of 23 October 1994 and on or about the morning of 24 October 1994, rape [MJR]." The assault specification alleges that appellant "did, at or near San Antonio, Texas, between on or about the evening of 23 October 1994 and on or about the morning of 24 October 1994, with intent to commit rape, commit an assault upon [MJR] by dragging her down the hall of his residence, throwing her onto his bed and pinning her onto the bed."

Before trial, defense counsel filed a motion for a bill of particulars to make the date, place, and time of the alleged offenses more specific. At trial, defense counsel withdrew the motion and stated on the record that he had been provided sufficient information about the offenses to prepare a defense.

Appellant and Airman First Class (A1C) MJR worked together in the same unit and became friends. They decided to socialize together and on the night of October 23, 1994, MJR went to appellant's house, where they spent some time drinking beer and watching a movie. MJR did not consider it a "date."

MJR testified that while they were sitting on a sofa and watching the movie, appellant put her leg on top of his. She told him to "quit it." Appellant asked MJR to scratch his back and she agreed. Appellant removed his shirt, saying that "he couldn't feel [MJR's] nails." When the movie ended, appellant started a second movie, came back to the sofa, grabbed her neck, and tried to kiss her. MJR testified that she told him to stop; "that we were just friends." She said that she tried to stand up and leave, but appellant grabbed her around the waist and pulled her toward the bedroom and threw her on the bed. She testified that she tried to stand and leave the bedroom but appellant blocked the door, grabbed her around the waist from behind, and they fell backwards onto the bed. She testified that appellant got on top of her, pinned her hands above her head with his left hand and tried to remove her clothes with his right hand. She testified that he pushed her shirt and bra up, pulled her shorts and underwear down, and raped her.

In his pretrial statement to the Air Force Office of Special Investigations (OSI), appellant described the events differently. He told the OSI that as they were sitting on the sofa, he put MJR's leg on top of his and began rubbing it, and she started to rub the inside of his left leg. He said that he asked MJR if she wanted to go to his room and she agreed. They walked to the bedroom together, undressed, and had consensual intercourse. Appellant did not testify at trial.

Defense counsel did not raise the multiplicity issue at trial. The prosecution theory was that the element of force in the

rape charge was proven by the acts alleged in the assault charge, and that both charges arose "out of the same incident, the same conduct that occurred on that night." Appellant was convicted, as charged, of both rape and assault with intent to commit rape. At the end of the sentencing hearing, the military judge *sua sponte* announced that he considered the two offenses as a single offense for sentencing.

Discussion

Appellant contends that assault with intent to commit rape is included in the offense of rape. He further argues that the military judge's failure to dismiss the lesser-included offense is plain error and therefore not waived by appellant's failure to raise the issue at trial. The Government asserts that the offenses are factually separate because the assault with intent to commit rape was completed before the rape. The Government further argues that appellant waived the multiplicity issue by not challenging the specifications at trial.

An accused may not be convicted and punished under more than one statute for the same act, if contrary to the intent of Congress. *United States v. Teters*, 37 MJ 370, 373 (CMA 1993). It follows that an accused may not be convicted and punished for two offenses where one is necessarily included in the other, absent congressional intent to permit separate punishments. *See* RCM 307(c)(4), Discussion, Manual for Courts-Martial, United States (1995 ed.) ("In no case should both an offense and a lesser included offense thereof be separately charged."); RCM 907(b)(3), Discussion ("A specification is multiplicious with another if it alleges the same offense, or an offense necessarily included in the other.")) *see also Albrecht v. United States*, 273 U.S. 1, 11 (1927) ("There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the

consummation of a transaction . . . and punishing also the completed transaction.").

Where the intent of Congress is unclear, the Supreme Court uses the "elements" test to determine whether one offense is "necessarily included" in another. "Under this test, one offense is not 'necessarily included' in another unless the elements of the lesser offense are a subset of the elements of the charged offense." *Schmuck v. United States*, 489 U.S. 705, 716 (1989). Our Court applied the elements test in *Teters, supra* at 376, and in *United States v. Foster*, 40 MJ 140, 142–43 (CMA 1994), to determine if one offense was necessarily included in another.

The elements test is a rule of statutory construction. *Ball v. United States*, 470 U.S. 856, 861 (1985). It is used to determine the intent of Congress where the legislative history does not display "an overt expression of legislative intent." *See Teters*, 37 MJ at 376–77. Thus, where the intent of Congress is clear, we need not resort to the elements test. *See United States v. Albrecht*, 43 MJ 65, 67 (1995) ("Where Congress somehow has expressed its intent in this regard [as to multiplicity], the question easily is answered.").

The legislative history of the treatment of assaults under the UCMJ reflects that Congress specifically rejected efforts to proscribe felonious assaults, that is, assaults with intent to commit specific felonies such as rape, under a separate penal statute. A proposed Article proscribing felonious assaults was not enacted because such assaults were considered to be attempts, punishable under Article 80, UCMJ, 10 USC § 880. *See United States v. Weymouth*, 43 MJ 329, 338–40 (1995) (summarizing legislative history). Notwithstanding Congress' rejection of a felonious-assault statute, such assaults have been prosecuted under Article 134 and have been considered lesser-included offenses of the intended felony. *See* paras. 43d(3), 44d(1), and 45d(1), Part IV, Manual for Courts-

Martial, United States (1995 ed.); Appendix 12, Manual for Courts-Martial, United States, 1969; Appendix 12, Manual for Courts-Martial, United States, 1951; *United States v. Gomez*, 46 MJ 241 (1997) (prosecution for assault with intent to commit rape not preempted by Article 80). The legislative rejection of a felonious-assault statute suggests that Congress did not intend an accused to be convicted and sentenced for both rape and assault with intent to commit rape, simply because Congress did not intend that the UCMJ expressly prohibit the offense of assault with intent to commit rape. Furthermore, as we pointed out in *Foster*, 40 MJ at 146, "with regard to assaultive and sexual crimes, . . . it is usually obvious that Congress could not have intended multiple convictions and multiple punishment for the selfsame act."

Finally, to the extent that congressional intent is ambiguous, resorting to the elements test verifies that the assault of which appellant was convicted is included in the rape and thus is not a separate offense. The elements of rape are: "(a) That the accused committed an act of sexual intercourse; and (b) That the act of sexual intercourse was done by force and without consent." Para. 45b (1), Part IV, Manual, *supra* (1995 ed.). It has long been recognized that a person who commits rape "necessarily commits an assault." *United States v. Headspeth*, 2 USCMA 635, 636, 10 CMR 133, 134 (1953); *see United States v. Schoolfield*, 40 MJ 132, 137 n. 7 (CMA 1994) (indecent assault is lesser-included offense of rape).

The elements of assault with intent to commit rape are: "(1) That the accused assaulted a certain person; (2) That, at the time of the assault, the accused . . . intended to commit rape . . .; and (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces." Para 64b, Part IV, Manual, *supra* (1995 ed.)

In *Foster*, 40 MJ at 143, this Court held that the third element of offenses under Article 134 is an implied element in the enumerated Articles. Thus, an offense under Article 134 can be a lesser included offense of an offense under an enumerated Article, notwithstanding the requirement under Article 134 to prove that the conduct was prejudicial or service-discrediting.

Comparing the elements of the present offenses, we hold that the assault with intent to commit rape is included in the rape in this case because the assault is the force required by the second element of rape.

We turn next to the question of waiver. Ordinarily, multiplicity is raised by a motion to dismiss under RCM 907(b)(3). In *United States v. Lloyd*, 46 MJ 19 (1997), this Court held that a multiplicity issue is waived by an unconditional guilty plea unless it rises to the level of plain error. Multiplicity is grounded in the Double Jeopardy Clause. *Teters*, 37 MJ at 373. Double-jeopardy claims are waived if not raised at trial. RCM 907(b)(2)(C); *United States v. Collins*, 41 MJ 428 (1995). Accordingly, we now hold that multiplicity is waived by failure to raise the issue by a timely motion to dismiss.

The final question is whether the multiplicious conviction in this case is plain error. In *Lloyd*, 46 MJ at 23, this Court, relying on *United States v. Broce*, 488 U.S. 563, 575 (1989), held that multiplicity issues may overcome waiver if the specifications are "'facially duplicative' that is, factually the same." Applying the "facially-duplicative" test, we conclude that the assault specification in this case facially duplicates the rape specification because it merely describes the force used to commit the rape. Accordingly, we hold that appellant's conviction of both offenses was plain error and requires dismissal of the lesser-included offense. We further hold, however, that appellant was not prejudiced with respect to

sentencing, because the military judge treated the offenses as a single offense for sentencing.

Decision

The decision of the United States Air Force Court of Criminal Appeals as to the Additional Charge and its specification (assault with intent to commit rape) is reversed. The findings of guilty thereon are set aside and the Additional Charge and its specification are dismissed. In all other respects, the decision below is affirmed.

Chief Judge COX and Judge SULLIVAN concur.

EFFRON, Judge (concurring):

I concur in the majority opinion, but write separately to suggest an alternative approach to address the significant amount of time and effort devoted to multiplicity litigation, which frequently produce results that do not have a significant impact on the interests of either an appellant or the Government, regardless of who prevails on appeal.

I. *Background*

Multiplicity litigation has been marked by instability in doctrine and *ad hoc* resolution of cases, reflecting military justice considerations that increase the potential for trials involving multiple charges. The concept of multiplicity involves two separate concerns: first, the constitutional and statutory prohibitions against double jeopardy; and second, the impact of multiple charges growing out of the same transaction or series of transactions on the exercise of discretion with respect to charging and sentencing.

A. *Constitutional Concerns*

The Fifth Amendment to the Constitution provides that no person shall "be subject, for the same offense, to be twice put in jeopardy of life or limb," a doctrine that also is reflected in Article 44, Uniform Code of Military Justice, 10 USC § 844. *See also* RCM 907(b)(2)(C), Manual for Courts-Martial, United States (1995 ed.). Double jeopardy not only prohibits successive trials for the same offense; it also prohibits separate convictions for the same offense at the same trial. *Ball v. United States,* 470 U.S. 856, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985); *United States v. Teters,* 37 MJ 370, 373 (CMA 1993).

The double-jeopardy aspect of multiplicity has spawned extensive litigation concerning whether two nominally separate offenses are, in fact, the same offense. Over the years, the Manual for Courts-Martial, this Court, and other courts have developed, revised, rejected, and regenerated a variety of tests for multiplicity, as well as for whether a claim of multiplicity has been waived by failure to make a timely motion at trial.

In this regard, commentators have expressed significant frustration at both the volume of multiplicity litigation and the inability of the courts to develop stable and consistent tests for appellate review. *See, e.g.,* Barto, *Alexander the Great, the Gordian Knot, and the Problem of Multiplicity in the Military Justice System,* 152 Mil. L. Rev. 1 (Spring 1996); Young, *Multiplicity and Lesser-Included Offenses,* 39 A.F. L. Rev. 159 (1996); Herrington, *Multiplicity in the Military,* 134 Mil. L. Rev. 45 (Fall 1991). This has led to recommendations for legislative and regulatory action, as well as to suggestions for new judicial approaches. *See, e.g.,* Barto, *supra* at 28–30 (recommending that the President establish a "Table of Equivalent Offenses"); *see also United States v. Turner,* 28 MJ 556 (CGCMR 1989) (urging Code Committee and Joint-

Service Committee on Military Justice to examine multiplicity).

B. *Tests for Evaluating Claims of Multiplicity*

Very early, the Manual provided a test for multiplicity that rings familiar today: "The offenses are separate if each offense requires proof of an element not required to prove the other." Para. 76a(8), Manual for Courts-Martial, United States, 1951. This language was consistent with the decision of the Supreme Court in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 79 L.Ed. 306, 309 (1932), which adopted a statutory-elements test for multiplicity. The 1969 version of the Manual did not carry this elements test forward, however, and permitted findings of guilty "without regard to whether the offenses are separate." *See* para. 74b(4), Manual for Courts-Martial, United States, 1969 (Revised edition).

The major revision of the Manual for Courts-Martial in 1984 provided broad standards for determining multiplicity for findings. Multiplicious specifications were defined in terms of alleging "the same offense," "necessarily included in the other," and describing "substantially the same misconduct in two different ways." RCM 907(b)(3)(B), Discussion, Manual for Courts-Martial, United States, 1984. That guidance remains unchanged in the current edition of the Manual. *See* RCM 907(b)(3)(B), Discussion, Manual, *supra* (1995 ed.).

Military case law also has adopted a variety of different tests over the years. In *United States v. Baker*, 14 MJ 361, 366–70 (1983), this Court reviewed our earlier treatment of this issue and set out a three-step approach to the multiplicity analysis: (1) Was there an initial unreasonable multiplication of charges? (2) Was it proper to find appellant guilty of two offenses? (3) Could appellant be separately punished for each

offense? A reading of this Court's relevant opinions over the 10 years following *Baker*, however, indicates a struggle in the application of that approach.

In *United States v. Teters*, *supra*, we sought uniformity and clarity by looking to civilian precedent. Concluding that "the time ha[d] passed for a separate military-law doctrine," 37 MJ at 376, the Court cited *Blockburger* and announced that the "test is to be applied to the elements of the statutes violated and not to the pleadings or proof of these offenses." *Id.* at 377. We stated that once the *Blockburger* "separate elements test" has been satisfied, separate convictions and punishment are authorized. *Id.* at 377–78. Only 2 years later, however, the multiplicity analysis was expanded beyond *Blockburger*. In *United States v. Weymouth*, 43 MJ 329 (1995), this Court recognized that the historical significance of pleadings, the policy to try all known charges in a single proceeding, and the incentive to multiply charges because of the military sentencing scheme supported an "elements/pleadings" approach to military multiplicity issues, in deviation from civilian practice.

C. *Tests Concerning Waiver of Multiplicity Claim*

In addition to lack of stability in the tests for identifying multiplicity, we also have employed varying standards for determining whether the issue of multiplicity has been waived. *See* RCM 905(e).

In a non-multiplicity context involving the issue of double jeopardy, the Court early on recognized the "general rule" that, absent "unusual circumstances," "a claim of former jeopardy must be raised before the conclusion of the trial or it is waived." *United States v. Schilling*, 7 USCMA 482, 483, 22 CMR 272, 273 (1957). In a wave of post-*Baker* cases, however, the Court granted relief without even mentioning

whether trial motions had been made—and, consequently, without explicit reference to plain error. The Court clarified its treatment of those cases in *United States v. Holt*, 16 MJ 393, 394 (1983), in which the Court observed:

> In cases in which application of the *Baker* standard has compelled a conclusion that findings were multiplicious, we have viewed as plain error the failure of the trial or intermediate appellate courts to dismiss the included offenses. In such instances, we have not hesitated to grant relief, even though the defense had not complained of multipliciousness at trial or on appeal.

Waiver absent plain error continues to be the approach today. *See United States v. Carroll*, 43 MJ 487, 488 (1996). In contrast to the pre-*Holt* cases, however, the Court now is open in its search for plain error. *Accord United States v. Lloyd*, 46 MJ 19 (1997). This rule is consistent with federal civilian practice. *See United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)(double-jeopardy objections may be waived or forfeited passively by failure to object).

II. *Multiplicity Considerations Unique to the Military Justice System*

I recognize this Court's obligation to articulate clear standards for reviewing issues involving multiplicity. I have no illusion, however, that a significant reduction in the volume of multiplicity litigation can be produced solely as a result of enhanced clarity. Multiplicity analysis involves an *ad hoc*, case-by-case assessment of factual circumstances and the relationship of those facts to the elements of two or more court-martial offenses. Given the wide variety of charges that are available to punish similar misconduct under the Code, no

readily available formula has been developed to date that would simplify multiplicity analysis.

Although the issue of multiplicity can arise in civilian trials, the volume and complexity of multiplicity litigation in the military setting appears to be much greater than in the civilian community. The differences may well reflect the unique functions of a military justice proceeding. A civilian criminal trial is intended primarily to determine guilt or innocence with respect to a particular incident or related series of incidents and, in the event of a guilty finding, to determine whether the person should be confined or fined. Although a military trial has the same goals, it also is concerned with the efficient maintenance of good order and discipline.

As a result, it is a common military practice to try all known offenses in the same proceeding, even if the offenses are substantially unrelated. *See Weymouth*, 43 MJ at 335–36; *see also* RCM 307(c)(4). In addition to the traditional criminal law punishments of confinement and fines, a military sentencing proceeding is equally concerned with punishments that can affect an individual's military status—*e.g.*, a discharge, a reduction in rank, or a forfeiture of pay. Given the impetus to maintain good order and discipline, to try all known offenses at once, and to relate those offenses to the individual accused's military status, there is a much greater likelihood of multiple charges, even arising from a single incident, in military trials than in civilian proceedings.

The Discussion accompanying RCM 307(c)(4) contains the following admonition:

> What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person. *See* RCM 906 (b)(2) and 1003(c)(1)(C). For example, a person should not be charged with both failure to report for a routine scheduled duty, such as reveille, and with

> absence without leave if the failure to report occurred during the period for which the accused is charged with absence without leave. There are times, however, when sufficient doubt as to the facts or the law exists to warrant making one transaction the basis for charging two or more offenses. In no case should both an offense and a lesser included offense thereof be separately charged.
>
> *See also* RCM 601(e)(2) concerning referral of several offenses.

The Discussion, however, does not establish a legally binding limitation. Drafters' Analysis, Manual, *supra* at A21–3. As a result, even when "[w]hat is substantially one transaction" is transformed into multiple charges that arguably reflect "an unreasonable multiplication of charges," an accused is not guaranteed relief at trial absent a demonstration that the charges are, in fact, multiplicious as a matter of law.

Even when charges apparently are multiplicious, the military judge has discretion to allow the charges to stand during trial—at least pending a determination of guilt or innocence—to meet exigencies of proof. *United States v. Morris*, 18 MJ 450 (CMA 1984); *United States v. Stegall*, 6 MJ 176 (CMA 1979); *United States v. Fortney*, 12 MJ 987 (AFCMR 1982); *United States v. Croom*, 1 MJ 635 (ACMR 1975); *see also* RCM 907(b)(3)(B). Ultimately, if findings of guilty are entered on both charges, the military judge should dismiss one of the charges. *United States v. Zupancic*, 18 MJ 387 (CMA 1984). During sentencing, where a charge is not clearly multiplicious, the military judge often will endeavor to ameliorate what appears to be an unreasonable multiplication of charges by determining that the charges should be considered multiplicious for sentencing. *United States v. Traxler*, 39 MJ 476, 480 (CMA 1994); *see also* RCM 1003(c)(1)(C).

As a result, the same word—"multiplicious"—has been used to describe two different matters: (1) a non-discretionary legal limit on offenses during findings; and (2) a discretionary decision by the military judge to combine offenses during sentencing. In that regard, the President could help reduce the potential for confusion by using a term other than "multiplicious" to describe offenses combined by a military judge as a matter of discretion during sentencing. *See* Art. 36, UCMJ, 10 USC 836.

III. *A Proposed Approach to Appellate Review Addressing the Interests of the Parties*

Appellate consideration of multiplicity cases typically involves one of two circumstances:

> (1) review of a determination by the military judge that the charges were not multiplicious for either findings or sentence; or
>
> (2) review of a determination by the military judge that the multiple charges are not multiplicious for findings in circumstances where the military judge decides to treat the charges as a single offense during sentencing.

In the second circumstance, an accused on appeal typically will seek dismissal of one of the charges. When this Court has responded by ordering dismissal of a charge, we implicitly have recognized that prejudice from multiplicious findings extends to the finding, not just to the sentence. *See Holt*, 16 MJ at 393. More recently, we expressly have focused on the constitutional and statutory double-jeopardy rights of an accused to not carry two convictions for what is essentially a single offense. *See United States v. Harwood*, 46 MJ 26, 28–29 (1997), citing *Rutledge v. United States*, ___ U.S. ___, 116 S.Ct. 1241 (1996), and *Ball*, 470 U.S. at 856, 105 S.Ct. at 1668.

In view of the responsibility of appellate defense counsel to review the record of trial thoroughly, to raise all issues that reasonably could lead to relief for the client, and to call matters to the attention of the appellate courts pursuant to *United States v. Grostefon*, 12 MJ 431 (CMA 1982), there is substantial appellate litigation concerning findings multiplicity, even though the practical effect of such litigation may be minimal in many cases. Even when an appellant prevails, the sentence usually is not changed, and that appellant remains convicted of a serious charge. The only effect is that a lesser charge is removed from his or her record. Accordingly, while it legally may be compelled, there is little reason to believe that, from a practical perspective, removal of the lesser charge will have a significant impact on an appellant's future prospects or endeavors.

The Government has been reluctant either to concede error or take other steps that would moot multiplicity issues. The primary concern appears to be that dismissal of a less-serious charge could put the Government's interests at risk if, on appeal, the more-serious charge is dismissed. I note, however, that if a rehearing on the greater offense is authorized, double jeopardy does not bar retrial on either the greater or the lesser charge where an appellant is successful on appeal. *United States v. Ball*, 163 U.S. 662, 672 (1896). The Government's interest is not a double-jeopardy concern but a practical concern. The Government is reluctant to agree to dismissal of a lesser charge, run the risk of losing the greater offense during further appeal, and then be put to the time and expense of a new trial when the conviction of the lesser offense was obtained lawfully.

In my view, this problem could be remedied if appellate authorities (*i.e.*, the Courts of Criminal Appeals and this Court) were to enter a "conditional dismissal" of a colorably multiplicious charge under which the less-serious charge

would be dismissed without prejudice to: (1) considering the facts surrounding the lesser offense as matters in aggravation with respect to the sentence; and (2) reinstatement of the dismissed charge before the case becomes final should the more-serious charge be dismissed. There is the potential to substantially reduce appellate litigation in this area, without prejudice to either party, if appellate authorities—in the interest of judicial economy—were to dismiss conditionally lesser charges in any case involving a colorable allegation of multiplicity and no perceptible impact on the sentence.

IV. *Application of the Proposal to the Present Case*

A. *The Competing Views of the Parties*

The case before us illustrates the potential benefits of such an approach. The issues at trial revolved around different versions of events between appellant and the victim regarding the victim's consent. The Government presented evidence that appellant forcibly dragged the victim down the hallway of his apartment from his living room to his bedroom and then raped her. Appellant was charged with two separate offenses: assault with intent to commit rape and rape.

During his closing argument on the merits, trial counsel acknowledged that "both charges ar[o]se out of the same incident, the same conduct that occurred on that night. . . ." Although defense counsel did not raise the issue of multiplicity for either findings or sentence, the military judge *sua sponte* commented prior to the sentencing arguments of counsel:

> By the way. I considered the two offenses multiplicious for sentencing purposes without elaborating the many theories that that in my opinion is appropriate. I'll consider the two offenses

but one offense for sentencing purposes. Proceed please.

Neither counsel offered comment or objection to this ruling.

In support of his appellate contention that the findings are multiplicious, appellant points out that the President has indicated in the Manual that assault with intent to commit rape—an offense set out by the President under the General Article of the Uniform Code, Article 134, 10 USC 934—is a lesser-included offense of rape. *See* para. 45d(1)(b), Part IV, Manual, *supra*. Moreover, in light of this Court's precedent that assault with intent to commit rape and attempted rape are multiplicious, at least where the facts demonstrate a continuous course of conduct, *see United States v. Gibson*, 11 MJ 435 (CMA 1981), appellant argues that it would be illogical to hold that assault with intent to commit rape is not a lesser-included offense of the completed offense of rape. Given this relationship, he contends that the military judge's failure to treat the charges as one for findings was plain error because the offenses were multiplicious for findings. *See Weymouth*, 43 MJ at 329; *United States v. Schoolfield*, 40 MJ 132 (CMA 1994).

The Government, on the other hand, contends that the offenses are not multiplicious. According to the Government, the assault is based upon appellant's dragging his victim down the hallway, throwing her on the bed, and pinning her down, which makes the assault offense complete at that time. The rape was based upon the facts that occurred thereafter. *See United States v. Edwards*, 35 MJ 351 (CMA 1992). The Government argues that, under these circumstances, where the assault and the rape are based on different facts, they are neither lesser-included nor multiplicious. *See United States v. Neblock*, 45 MJ 191 (1996). Alternatively, even if not separate, the Government takes the position that failure to treat them as a single offense for findings was not clear and

obvious error, *see United States v. Fisher*, 21 MJ 327 (CMA 1986), so appellant's failure to raise the issue at trial forfeited his appellate complaint. *See* RCM 905(e) and 907(b)(3)(B); *Carroll*, 43 MJ at 487.

This case well illustrates the difficulty of achieving any level of comfort and confidence in the task of formulating and articulating principles of multiplicity that will lead unerringly to rational results in particular cases. The Government points to this Court's recent decision in *United States v. Oatney*, 45 MJ 185, 188 (1996), in which a majority offered the following view:

> Moreover, the pragmatic or realistic comparison approach of [*United States v.*] *Foster*[, 40 MJ 140 (CMA 1994),] still requires, at the very least, a conclusion that the greater offense could not possibly be committed without committing the lesser offense. *See United States v. Schoolfield*, 45 MJ at 137 (rape and indecent acts); *United States v. Foster*, 40 MJ at 146 (sodomy and indecent acts).

On the one hand, there are likely to be few circumstances in which a person could commit rape without, in the process, assaulting the person with intent to rape, given the essence of an assault being an offensive touching. On the other hand, the assault with intent to commit rape that is charged need not necessarily be the offensive physical touching that is inherent in the course of accomplishing the rape. *See, e.g., United States v. Hicks*, 24 MJ 3 (CMA 1987); *United States v. Watkins*, 21 MJ 224 (CMA 1986).

The Government argues that the assault was complete when appellant dragged his victim down the hall, threw her on the bed, and pinned her hands down. Under the Government's theory, throwing the victim onto the bed and pinning her hands down, immediately prior to removing her clothes and

raping her, would constitute an assault that is separate from the rape. Theoretically, each of the acts—dragging her down the hall, throwing her onto the bed, and pinning her hands down—could be viewed as a separate assault with intent to commit rape. In that regard, there could have been far more than two charges in this case, with little practical end to the possibilities for charging multiple offenses.

B. *Judicial Considerations*

Military judges usually have little difficulty arriving at sensible conclusions as to whether two or more findings should be treated as one for purposes of sentencing. In the case before us, for example, the military judge treated these offenses as multiplicious for sentencing while declining to "elaborat[e on] the many theories" that, in his opinion, made such treatment "appropriate." Yet, if two convictions truly do grow out of "the same conduct, even if sentenced under only one, . . . the second conviction, even if it results in no greater sentence, is an impermissible punishment." *Ball, supra* at 861, 865

Because *Ball* does not permit us to ignore the findings, even when the offenses have been treated as multiplicious for sentencing, the interests of appellate judicial economy suggest the need to develop a more practical approach to claims of multiplicious findings. Accordingly, at least where: (1) the case involves a purported lesser offense, (2) there is a colorable basis for the claim of findings' multiplicity, and (3) the claim, if granted, would not result in sentence relief, appellate courts should order a "conditional dismissal" in the interests of judicial economy. The dismissal would become effective when direct review becomes final in the manner described in Article 71(c), UCMJ, 10 USC 871(c). Such a disposition would be appropriate, for example, in cases either where the military judge has treated the offenses in issue as

multiplicious for sentencing or where the sentence would be affirmed under application of the principles articulated in *United States v. Sales*, 22 MJ 305, 307–08 (CMA 1986), and *United States v. Suzuki*, 20 MJ 248, 249 (CMA 1985). The procedure described above would protect the interests of an appellant with respect to former-jeopardy concerns and would protect the interests of the Government in the event that the remaining charge is dismissed during further review.

In my view, the power to order such a conditional dismissal is well within the inherent authority of appellate courts. In order to minimize appellate litigation, however, it would be preferable for the President to expressly authorize this procedure in the Manual for Courts-Martial. *See* Art. 36. In addition, as noted in Part II, the President could enhance the clarity of the law in this area by using a term other than "multiplicious" (*e.g.*, consolidation) to describe offenses that are combined by a military judge as a matter of discretion during sentencing.

CRAWFORD, Judge (dissenting):

I would apply waiver. In *United States v. Lloyd*, 46 MJ 19, 20 (1997), this Court held that "the Court of Criminal Appeals erred as a matter of law in establishing a 'new bright line rule' concerning the forfeiture of all multiplicity claims not raised at trial." This Court recognized that there may be a "passive waiver." *Id.* at 22. In addition, we noted that where indecent acts and rape specifications are not "facially duplicative," a guilty plea forecloses raising a multiplicity issue. *Id.* at 20.

The offenses in this case are not facially duplicative. One, assault with intent to commit rape, requires a specific intent. The other, rape, requires a general intent.

It is difficult to find error in this case that "affect[s] substantial rights" as required under the plain-error doctrine. *United States v. Olano*, 507 U.S. 725, 735 (1993). Appellant is not threatened with trial for another act arising out of the same

incident. The conviction will not affect his parole eligibility. Finally, the judge treated the offenses as multiplicious for sentencing purposes.